FOR ARGUMENT

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# In the Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-602**

DONALD W. AGINS and BONNIE G. AGINS,
*Appellants,*
vs.
CITY OF TIBURON,
*Appellee.*

## Brief of Amicus Curiae State of California, Acting by and Through the California Coastal Commission, the San Francisco Bay Conservation and Development Commission, and the California Tahoe Regional Planning Agency

Appeal from the Supreme Court of California

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## Brief of Amicus Curiae State of California, Acting by and Through the California Coastal Commission, the San Francisco Bay Conservation and Development Commission, and the California Tahoe Regional Planning Agency

Appeal from the Supreme Court of California

This Honorable Court has noted probable jurisdiction of an appeal in this case from the judgment of the Supreme Court of California. This amicus curiae brief is respectfully submitted by the State of California in support of the appellee City of Tiburon, by and through its Attorney General, and acting at the request of the California Coastal Commission, the San Francisco Bay Conservation and De-

velopment Commission, and the California Tahoe Regional Planning Agency.[1]

## INTEREST OF THE STATE OF CALIFORNIA

The California Coastal Commission, the San Francisco Bay Conservation and Development Commission, and the California Tahoe Regional Planning Agency, the agencies of the State of California at whose request this brief has been filed, have extensive regulatory authority over the proposed use and development of land and water areas within their respective jurisdictions. Protection of the natural resources and environment of the California coastline, of San Francisco Bay and of the California portion of the Lake Tahoe Basin is a paramount objective for these agencies. E.g., *CEEED v. California Coastal Zone Conservation Commission, supra,* 43 Cal.App.3d 306; *People ex rel. S.F. Bay Con. etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533. California's actions taken by these agencies to promote

1. The California Coastal Commission is an agency of the State of California, charged with the duty of developing and enforcing plans for the permanent protection and restoration of the California coastline. Calif. Public Resources Code §§ 30000 et seq. The Commission and its functions are the outgrowth of an extensive planning and regulatory process mandated by the People of California in an initiative adopted in 1972. The constitutionality of that planning and regulatory process has been upheld against constitutional attack. *CEEED v. California Coastal Zone Conservation Commission* (1974) 43 Cal.App.3d 306. The San Francisco Bay Conservation & Development Commission is also a public agency of the State of California. Calif. Government Code §§ 66600 et seq. One of the Commission's main purposes is to provide permanent protection for the San Francisco Bay and its shoreline. The Commission's enabling legislation has likewise been upheld against constitutional attack. *Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com.* (1970) 11 Cal.App.3d 557. The California Tahoe Regional Planning Agency exercises planning and regulatory authority over the California portion of the Lake Tahoe Basin. Calif. Government Code §§ 67000 et seq. It too is engaged in litigation where landowners have asserted that its regulatory actions constitute a taking of property.



the objective of protection of natural resources have resulted in litigation where landowners have charged that the effect is to have inversely condemned their properties. E.g., *State of California v. Superior Court* (1974) 12 Cal.3d 237; *Candlestick Properties, Inc., supra,* 11 Cal.App.3d 557. The Coastal Commission alone, for example, is engaged in inverse condemnation litigation in which the monetary claims total more than $150,000,000. The California Tahoe Regional Planning Agency is engaged in similar litigation, with claims of more than $100,000,000.

In such cases, the agencies have consistently contended that their regulatory actions, taken pursuant to their respective enabling laws, constitute appropriate exercises of the police power; if they have improperly exercised that power, the remedy is invalidation of the action, rather than an award of damages to the afforded landowner. The issues in this case are thus of critical importance to them, and the State of California therefore respectfully requests that its contentions be considered in this case.

## SUMMARY OF ARGUMENT

1. The appellants assert that the California Supreme Court decision must be reversed, since the City's ordinances *as applied* prevent any viable economic use of their land. Juris. St. 28; App. Brief 7.[2] They claim that the California Court "ignored the allegation of the Complaint that, *as*

2. Some of the appellants' amici make the same claim: "[t]his case . . . presents this Court with the issue of whether a landowner is entitled to his day in court with the opportunity to prove that regulations, which on their face appear to be valid, may in fact be invalid *when applied* to his property." National Association of Manufacturers Brief 3 (emphasis added). "[T]he challenge to and the allegation of 'taking' arises not from the face of ordinance but from *effects* of the actions of governmental body and the *effect* of the regulatory restrictions on the property . . ." San Diego Gas & Electric Brief 14.

*applied to their property* the zoning was confiscatory." App. Brief 9 (emphasis added); see Juris. St. 9. They emphasize that "[t]he allegations at bench are that the large-lot zoning involved here, [fn. omitted] has deprived the subject property of all utility and value." App. Brief 23.

Those claims are not properly before the Court. The California Supreme Court authoritatively construed the City's ordinances as permitting as a matter of right the construction of at least one residence on the appellants' property. J. S. A. 3, 13. The ordinances further permit the possible construction of up to five residences on the property, after application by the landowner and consideration by the City. *Id.* However, the appellants have never sought such approval.

Under these circumstances, the California Supreme Court properly considered only the validity of the ordinances on their face; the validity of the ordinances *as applied* cannot be determined unless and until the appellants seek approval from the City. The only question properly before the Court is therefore whether the ordinances permitting the construction of one residence as a matter of right, and perhaps up to five residences, facially constitute a taking of property.

2. California law requires each city and county to adopt comprehensive plans designed to ensure the appropriate, balanced and controlled growth of the state. As part of each such plan, cities and counties are required to adopt open space elements; those elements require the cities and counties to protect natural resources and provide against the deleterious effects of urban sprawl. The City's ordinances involved in this case were adopted as part of these requirements, as were other City ordinances dealing with other required subjects, including housing.



The ordinances applicable to the appellants' property seek to provide "for the reasonable use of open space land, while at the same time preserving and protecting its open space characteristics." They do not, and cannot under California law, prohibit all reasonable use of the property. The goal of the ordinances, the preservation of natural resources and open space, is a permissible governmental goal, and may be achieved not only by eminent domain, but by regulation: the fact that a regulatory measure is enacted to serve such a public interest does not mean that it amounts to a public use requiring compensation.

3. The restrictions imposed by the ordinances do not constitute a taking of property. They permit one residence on the property as a matter of right. Depending upon the nature of the property, geological restraints and the property's resource characteristics, and depending upon the form in which development is proposed, the ordinances permit up to five residences. The contrary allegations of the complaint were therefore properly ignored by the California Supreme Court.

4. Moreover, even assuming that the ordinances constitute a taking of the appellants' property, the appropriate remedy is invalidation of the ordinances rather than an award of damages. An award of monetary damages for a regulatory action which constitutes a taking is appropriate only where the regulating agency has affirmatively determined to exercise its eminent domain power and is authorized to make that determination. The City of Tiburon has not so determined, and the California Legislature has forbidden the taking of property without compensation by means of open space ordinances. Monetary damages in this case would thus effectively transfer the power of eminent

domain from the appropriate legislative bodies to the judiciary.

In addition, an award of monetary damages under these circumstances would paralyze land use regulatory agencies throughout the United States. Given the appellants' position that the intent of the regulating entity is irrelevant in determining whether a constitutional violation has occurred and that the only significant question is whether a taking has in fact occurred, only the bravest legislator or regulator will venture more than the mildest and most ineffectual form of land use controls. For these reasons, the appellants' position should be rejected.

## I. A Determination of the Constitutional Questions Raised by This Case Must Be Limited to the Effect of the Ordinances on Their Face. The California Supreme Court Lacked Jurisdiction to Consider the Effect of the Ordinances as Applied. This Court Should Not Consider the Effect of the Ordinances as Applied Since No Application for a Permit Was Ever Made or Decided.

In 1973, the City adopted two zoning ordinances which had the effect of rezoning the five-acre property of the appellants, among others, to a RPD-1 zone. J. S. A. 28-46. Among the uses permitted in such a zone are "one-family dwellings." J. S. A. 31. The appellants' complaint alleged that they acquired their property for such residential purposes, and that such uses were the highest and best use of the land. J. A. 4. The permissible density of residences under the zoning ordinance is "not less than .2 nor more than 1 dwelling unit per gross acre . . ." J. S. A. 32. The California Supreme Court construed the ordinance:

> "As applied to plaintiffs' five acres 'RPD-1' zoning means a maximum of five dwelling units or a minimum of one. Whether plaintiffs are permitted to build five dwelling units, or fewer, will depend upon the particular architectural design contemplated and the results of the required environmental impact report." J. S. A. 3.[3]



As the California Court also recognized, however, the appellants "have never made application to use or improve their property following Tiburon's adoption of Ordinance No. 124 N.A., nor have they either sought or received any definitive statement as to how many dwelling units they could build on their land." J. S. A. 3. Whether they would be limited to only the one dwelling unit permitted as a matter of right by the ordinance, or whether they would be permitted to develop their property with two, three, four or five dwelling units thus cannot be known in this litigation. Under these circumstances, their claim that the California Supreme Court "ignored the allegation of the Complaint that, as applied to their property, the zoning was confiscatory" must fall. App. Brief 9. How the ordinance might actually be applied is purely speculative; a determination of constitutionality in this case must therefore be limited to the validity of the ordinance on its face. We believe this is so, for two distinct reasons.

### A. THE CALIFORNIA SUPREME COURT LACKED JURISDICTION TO DETERMINE THE VALIDITY OF THE ORDINANCE AS APPLIED, DID NOT DETERMINE SUCH VALIDITY, AND THAT QUESTION THUS IS NOT PROPERLY BEFORE THE COURT

The California cases have consistently reiterated the rule that the California courts do not have jurisdiction to determine an action unless the party seeking relief has first

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3. Amicus Half Moon Bay Properties strenuously objects to the California Supreme Court's interpretation of the ordinance and offers its own reading. Brief 6-10. The California Court's interpretation is, of course, a final and binding interpretation of state law which controls here. "Whether decided well or otherwise by the State court, we have no authority to inquire." *Murdock v. City of Memphis* (1875) 20 Wall. 590, 638.

exhausted his administrative remedies. *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280; *City of Susanville v. Lee C. Hess Co.* (1955) 45 Cal.2d 684. Unlike the federal exhaustion rule, the doctrine of exhaustion of administrative remedies is a fundamental rule of jurisdiction in California. *Abelleira v. District Court of Appeal, supra*; *Clark v. Personnel Board* (1943) 61 Cal.App.2d 800; *Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 981.[4]

This rule applies to actions raising a claim of inverse condemnation. In *Metcalf v. County of Los Angeles* (1944) 24 Cal.2d 267, the Court refused to entertain a constitutional challenge to a zoning ordinance as applied, until a permit application had been made to the County. As the Court explained, " 'the legislative process remains incomplete' " until such an application is made and considered, and judicial intervention prior to that time is jurisdictionally impermissible. 24 Cal.2d at 27; *accord*: *Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal. App.3d 244, 249-251; *People v. Superior Court (Tidwell)* (1979) 91 Cal.App.3d 95; *Igna v. City of Baldwin Park* (1970) 9 Cal.App.3d 909; *Dunham v. City of Westminster* (1962) 202 Cal.App.2d 245.

In the California courts, the City of Tiburon argued these principles: it contended that the courts lacked jurisdiction to consider the appellants' claim, because they had never applied for a permit under the zoning ordinance. Respondent's Brief (California Court of Appeal) 17-19; Petition for Hearing (California Supreme Court) 2-8. The California Supreme Court opinion nonetheless does not explicitly mention an exhaustion requirement. However,

4. Amicus Half Moon Bay Properties, Inc., has conceded this California jurisdictional rule. Brief 24. While some of the other amici states may vary as to the jurisdictional nature of the rule, it is a significant rule of general application.



the method of analysis utilized by the Court makes it apparent that that well understood California rule in fact underlies its decision. As the appellants suggest, the Court "ignored the allegation of the Complaint that, as applied to their property the zoning was confiscatory" (App. Brief 9, n. 2), since that question could not properly be before the Court: the failure of the appellants to seek a permit jurisdictionally precluded consideration of that question. As the appellants also suggest, however, the Court did state "that the ordinance on its face purported to give some economic use to their property." *Id.* In light of the failure of the appellants to seek a permit, that was the only question which *could* jurisdictionally be considered.

This construction of the California Supreme Court opinion is compelled by *Pan Pacific Properties, Inc. v. County of Santa Cruz, supra,* 81 Cal.App.3d 244. The landowner in that case asserted that a County's zoning ordinance constituted a taking of property. The ordinance, like the ordinance here, permitted the construction of at least one residence on the property. 81 Cal.App.3d at 251 and 255. The California Court of Appeal first held that the failure of the landowner to seek a permit under the ordinance jurisdictionally precluded consideration of the constitutional claim. 81 Cal.App.3d at 251. The Court nonetheless considered the merits of the claim that the ordinance *on its face* constituted a taking of property. 81 Cal.App.3d at 253-256. The Court held that the ordinance on its face did not constitute a taking of property, since it conferred the ability to construct one residence on the property as a matter of right. *Pan Pacific* thus explicitly articulates, in a jurisdictional context, the principles which underlie the *Agins* decision.

The California jurisdictional rule relating to exhaustion of administrative remedies and claims of inverse condem-

nation is thus well established. The appellants' position here is one which was not and jurisdictionally could not have been considered by the California Supreme Court. Since the California courts were without jurisdiction to determine the question whether the ordinance as applied constituted a taking of the appellants' property, this Court likewise is without jurisdiction to consider the claim. Decision here must therefore be limited to the validity of the ordinance on its face.

### B. SOUND JURISPRUDENTIAL CONSIDERATIONS COMPEL THE CONCLUSION THAT THIS COURT SHOULD NOT CONSIDER THE VALIDITY OF THE ORDINANCE AS APPLIED, SINCE NO APPLICATION FOR A PERMIT WAS EVER MADE OR DECIDED

Even assuming that the California Supreme Court had jurisdiction to decide the validity of the ordinance as applied, this Court should decline to determine the constitutional questions which may be raised by its application. In the absence of a request for a permit by the appellants and in the absence of a decision by the City specifying the extent of use permissible on the appellants' property, such a determination would be purely speculative and advisory.

This Court has consistently refused to decide constitutional questions unless necessary and unless ripe for adjudication. As Mr. Justice Frankfurter has explained:

> "Courts do not review issues, especially constitutional issues, until they have to. [Citations omitted]. In part, this practice reflects the tradition that courts, having final power, can exercise it most wisely by restricting themselves to situations in which decision is necessary. In part, it is founded on the practical wisdom of not coming prematurely or needlessly in conflict with the executive or legislature." *Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U. S. 123, 154-155 (Frankfurter, J., concurring).



As he has further explained:

> "[T]he adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issues a practical necessity . . . . These considerations press with special urgency in cases challenging legislative or state judicial action as repugnant to the Constitution. 'The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.'" *Poe v. Ullman* (1961) 367 U.S. 497, 503.

The Court has also noted that "[m]erely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated." *Communist Party v. Subversive Activities Control Board* (1961) 367 U. S. 1, 71; *W. E. B. DuBois Clubs v. Clark* (1967) 389 U. S. 309. Here, the appellants' case does not present a ripe controversy, since it depends on the "concurrence of . . . contingent events . . . too speculative to warrant anticipatory judicial determinations." *Eccles v. Peoples Bank* (1948) 333 U. S. 426, 432. A ruling on the constitutional validity of the statute *as applied* must depend upon the uncompleted legislative process of the City of Tiburon (*Metcalf v. County of Los Angeles, supra,* 24 Cal.2d 267, 271), and upon the questions which may emerge from an application for a permit under the City's zoning scheme, the City's ultimate decision and the reasons for its action. "Rulings on these questions would plainly be rulings upon 'hypothetical situations that may or may not [arise].'" *Regional Rail Reorganization Act Cases* (1974) 419 U. S. 102, 146; *Toilet Goods Association v. Gardner* (1967) 387 U.S. 158, 163; *Eccles v. Peoples Bank, supra,* 432.

These sound jurisprudential considerations have also been consistently applied in cases involving local zoning ordinances; indeed, they are reflected in this Court's *corpus juris* from the earliest to the most recent expressions on the constitutional validity of land use regulations. In *Euclid v. Ambler Realty Co.* (1927) 272 U. S. 365, the Court upheld a comprehensive zoning ordinance against a claim of taking. Because the ordinance had not yet been enforced against the landowner, however, the Court declined to decide its constitutionality as applied:

> "It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises . . . some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be here and there, provisions of a minor character, or relating to matters of administration . . . which, if attacked separately, might not withstand the test of constitutionality. . . .
>
> "And this is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially, this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution, as applied to the exercise of the flexible powers of police, with which we are here concerned." 272 U. S. at 395-397.[5]



In *Penn Central Transportation Co. v. New York City* (1978) 438 U. S. 104, the Court reached a similar result. There, the landowner asserted that it had been prohibited completely from utilizing the airspace above Grand Central Terminal. Although the pertinent governmental agency had refused to permit the construction of a 50-story building above the Terminal, it had also "emphasized that whether any construction would be allowed depended upon whether the proposed addition 'would harmonize in scale, material, and character with [the Terminal].'" 438 U. S. at 137. The Court pointed out that "[s]ince appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of the portion of the airspace above the Terminal." *Id.* The rationale of *Penn Central* is equally applicable here: the appellants have never sought a permit for construction of more than the one residence which the Tiburon ordinance permits as a matter of right; the extent of additional construction which the City may or may not permit depends upon the application of the criteria specified in its zoning ordi-

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5. The Court reached the same result in *Allen v. Grand Central Aircraft Co.* (1954) 347 U. S. 535, 553, involving, *inter alia*, a claim that a federal act and administrative proceedings under it violated the Fifth Amendment by taking the appellee's property. The Court replied that "it would be premature action on our part to rule upon these until after the required administrative procedures have been exhausted."

nances. Under these circumstances, the validity of the ordinance *as applied* cannot properly be decided by the Court.

The rationale for requiring full and final consideration by an appropriate administrative body before the Court will decide constitutional questions has further been explained. In *Moore v. East Cleveland* (1977) 431 U. S. 494, Chief Justice Burger stated:

> "[I]f administrative remedies are pursued, the citizen may win complete relief without needlessly invoking judicial process.[6] This permits the parties to resolve their disputes by relatively informal means far less costly and time consuming than litigation. By requiring exhaustion of administrative processes the courts are assured of reviewing only final agency decisions arrived at after considered judgment . . . . Consistent failure by the courts to mandate utilization of administrative remedies—under the growing insistence of lawyers demanding broad judicial remedies—inevitably undermines administrative effectiveness and defeats fundamental public policy by encouraging 'end runs' around the administrative process.
>
> "... [N]o one has a right to a federal constitutional adjudication on an issue capable of being resolved on a less elevated plane. Indeed, few concepts have had more faithful adherence in this Court than the imperative of avoiding constitutional resolution of issues capable of being disposed of otherwise .... [S]o long as favorable administrative action is still possible, the policies favoring exhaustion are not mitigated in the slightest by the presence of a constitutional issue." 431 U. S. at 525-527 (Burger, C. J., dissenting).

The observations of the Chief Justice are confirmed by this case. The appellants contend that their challenge to

6. *Accord: Aircraft & Diesel Corp. v. Hirsch* (1947) 331 U.S. 752, 767-768.



the validity of the ordinance as applied is "heavily dependent on factual evidence (including expert testimony by engineers, appraisers and land economists)." App. Brief 14. The appellants thus apparently ask the Court to reach a result which would simply ignore the proper role of the City of Tiburon in the regulatory process, prematurely transfer that process to the judicial system, and then ask either a court or jury to resolve various technical questions of extraordinary complexity, including the extent to which additional development *might* be authorized by the City.[7]

Opinions often vary as to the possibility of gaining approval of proposed development and as to the result which the regulatory agency may ultimately reach, and it is not surprising that some witnesses can almost always be found who will testify that the agency involved will not approve specific forms of development. Such testimony puts the agency in the untenable position of offering limited countervailing testimony that approval *might* be given; the agency, however, can hardly be expected to offer concrete evidence that a discretionary approval *would* be given, since neither it nor its members have been presented with specific development proposals nor allowed to engage in the normal analysis it would undertake prior to a decision on approval. For example, in many cases, a commitment as to use by a California public agency would be improper without public hearings, prior consideration of specific development plans, and an environmental impact report. J. S. A. 3; Calif. Public Resources Code §§ 21000 et seq. Acceptance of the appellants' position would thus transfer administrative land use

7. This claim is no hyperbole. It is exactly what occurred in *San Diego Gas and Electric Co. v. City of San Diego,* now pending before this Court on appeal as No. 79-678. It is also what some of the appellants' amici have argued in cases against the State of California and its agencies.

processes to the courts, for trials which can amount to no more than sheer speculation.[8]

But the rationale of avoiding constitutional adjudication until a final agency decision has been reached is precisely to eliminate speculation and inferential conclusions as to what the actual effect of an ordinance is. Until the agency process is complete, the courts must necessarily speculate as to the ultimate outcome of decisions which are institutionally entrusted to other agencies of government. Unless application to the local government is required, the government is also deprived of an opportunity to fully develop the facts and apply its specialized expertise. In such situations, the Ninth Circuit has said that there is no case or controversy until the administrative process is complete. *Sea Ranch Association v. California Coastal Zone Conservation Commission* (9th Cir. 1976) 537 F.2d 1058; *Craycroft v. Ferrall* (9th Cir. 1969) 408 F.2d 587. Until that process is complete, any determination of what uses might ultimately be permitted is necessarily only speculation—and speculation is hardly an appropriate basis on which to award the more than $2,000,000 which the appellants seek in this case.

Unless the Court is to determine as a matter of law that a zoning ordinance which allows up to five units on a five acre parcel is unconstitutional on its face, the extent and nature of the relationship between the interests of the

8. We discuss later the paralyzing effect which monetary remedies for a regulatory taking will have on land use regulation. See pg. 44, *infra*. The asserted right of a landowner to proceed to trial where, as here, he has never even sought approval from the regulatory body is but another aspect of that problem. If the appellants' position is accepted, the governmental agency must then bear the tremendous expense of defending such suits which, as we have noted, can only involve speculative proof at best. The regulating body would also be forced to bear the uncertainty that the judgment might ultimately lead to a requirement of compensation for other land use decisions, either made or contemplated.



property owner and those of the public cannot be determined in the absence of a permit application and decision by the City. Since the zoning ordinance of the City guarantees the right to develop at least one unit on the parcel, the alleged taking must have occurred with respect to the remainder of the parcel that could not be developed. But, in the absence of a permit application and decision, the Court lacks the facts to properly assess the relationship of the developable area to the areas that may not be developed and the ultimate relationship of the impact of the regulation and the governmental purpose carried out through the zoning ordinance.

The Court has held that "'taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated" but rather the review of the Court must focus "*both* on the *character* of the action *and* on the *nature* and *extent* of the interference with rights in the parcel *as a whole* . . . ." *Penn Central Transportation Co. v. City of New York, supra,* 438 U. S. at 130-131 (emphasis added). Until the City of Tiburon acts on a permit application, it is impossible to assess the "character" of the governmental action, since both the action itself in specifying the number of allowable units and the findings adopted in support of the decision are essential ingredients in defining the "character" of the public action. Moreover, it is impossible to define either the "nature" or the "extent" of any alleged interference with rights in the parcel as a whole, until the number of units is determined and any possible conditions placed on the development are defined.

The various policies reviewed above are applicable here. They compel the conclusion that the only question properly before the Court is the constitutional validity of the

ordinances on their face. As we will demonstrate below, on their face the ordinances implement reasonable and permissible legislative goals. They also permit reasonable use of the appellants' property. They thus do not constitute a taking of property in violation of the Fourteenth Amendment.

**II. California Has a Statutory Program Providing for Balanced and Controlled Growth of the State. As Part of That Program, It Has a Policy of Preserving Open Space In Order to Protect Natural Resources and Against Urban Sprawl. This Program and Policy Are Constitutionally Permissible Objectives. As Part of California's Regulatory Program, Open Space and Protection of Natural Resources May Be Achieved by Regulation, Rather Than Only by Eminent Domain.**

This Court has held that "States and cities may enact land-use restrictions or controls to enhance the quality of life . . . " *Penn Central Transportation Co. v. City of New York, supra,* 438 U.S. at 129. In this section of the brief, we will explain that California has required local cities and counties to adopt comprehensive plans for that purpose. Among the elements which must be included in such plans is protection of natural resources and protection against the deleterious effects of urban sprawl, through open space zoning.[9] Other elements seek to provide for

9. California Government Code Section 65561 states:
"The Legislature finds and declares as follows:
(a) That the preservation of open-space land, as defined in this article, is necessary not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources.
(b) That discouraging premature and unnecessary conversion of open-space land to urban uses is a matter of public interest and will be of benefit to urban dwellers because it will discourage noncontiguous development patterns which unnecessarily increase the costs of community services to community residents.
(c) That the anticipated increase in the population of the state demands that cities, counties, and the state at the earliest possible date make definite plans for the preservation of valuable open-space land and take positive action to carry out such plans by the adoption and strict administration of laws, ordinances, rules and regulations as authorized by this chapter or by other appropriate methods.
(d) That in order to assure that the interests of all its people are met in the orderly growth and development of the state and the preservation and conservation of its resources, it is necessary to provide for the development by the state, regional agencies, counties and cities, including charter cities, of statewide coordinated plans for the conservation and preservation of open-space lands.
(e) That for these reasons this article is necessary for the promotion of the general welfare and for the protection of public interest in open-space land."

California Government Code section 65562 further declares:
"It is the intent of the Legislature in enacting this article:
(a) To assure that cities and counties recognize that open-space land is a limited and valuable resource which must be conserved wherever possible.
(b) To assure that every city and county will prepare and carry out open-space plans which, along with state and regional open-space plans, will accomplish the objectives of a comprehensive open-space program."



other substantial needs of California's population, including housing. Together, such plans, their mandatory elements, and their implementing zoning ordinances are the means for ensuring the appropriate, balanced and controlled growth of California. The City's ordinances here were adopted as part of this planning and regulatory process. These are permissible and constitutional regulatory goals, and do not require an exercise only of the eminent domain power for their achievement.

Under California law, all land use restrictions are necessarily controlled by a comprehensive general plan which

must be prepared by each City and County. Calif. Gov. Code § 65300. The California Legislature has mandated that "the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." Calif. Gov. Code § 65300.5.

The general plan must include a number of various elements. These elements are various policies and provisions dealing with land use, traffic circulation, housing, conservation, seismic safety, noise, open space, scenic highways and safety. Calif. Gov. Code § 65302. Once the general plan is adopted, with these mandatory elements, all subsequent zoning measures must conform to the general plan. Calif. Gov. Code § 65860. In short, the general plan is intended to be "a constitution for all future development within the city." *O'Loane v. O'Rourke* (1965) 231 Cal.App. 774, 782. The open space element of the general plan, therefore, is simply one of many factors which enters into a City's plan for future development of land within its jurisdiction. As we discuss more fully later, for example, California's Planning and Zoning Law also requires each city and county to make provision for adequate housing of all economic segments of the population. Calif. Government Code § 65302.

In order to carry out the policies of its open space element of the general plan, local governments must adopt a specific "action program". Calif. Gov. Code § 65564. The City's zoning thereafter must be "consistent" with the open space plan. Calif. Government Code § 65566. The ordinances applicable to the appellants' property were enacted as part of this mandatory statutory plan. J. S. A. 28-30; 41-45.

The most significant feature of the open-space provisions of the general plan law is that they are directed



toward the protection of important natural resources. An open space area may not be designated as "open space land" simply because it is undeveloped. Rather, any area designated under an open space plan must be both unimproved *and* an area warranting regulation for resource protection purposes. Under California Government Code section 65560, such areas must meet one of the following four requirements in order to be so designated: (1) "open space for the preservation of natural resources," including wildlife habitat, areas required for scientific study, waterfront lands and watershed lands; (2) "open space for the managed production of resources," including forestry lands, agricultural lands and fisheries resources; (3) "open space for outdoor recreation, including . . . areas of outstanding scenic, historic, or cultural values" and (4) "open space for public health and safety, including . . . areas which require special management or regulation because of hazardous or special conditions such as earthquake zones, unstable soil areas, flood plains" and other similar areas. It is thus clear that the California Legislature has established a statutory scheme, for the purpose of protecting resource values of statewide concern.

Legislative concern with the protection of significant resources has been heightened by the pressures generated by a rapidly urbanizing society and by the need to assure the long-term protection of vital resources. But the source of such authority lies even in the common law. For example. in upholding the constitutionality of the California Coastal Zone Conservation Act of 1972, the California Court of Appeal declared:

> "Most of the recent state laws affecting land use are designed to control or prevent uses harmful to the environment or to the natural resources of the state.

> Such land use controls are premised on the state's traditional power to enact legislation to prohibit or prevent activities which are or may become public nuisances and therefore . . . the nature of the governmental interest differs substantially from that involved in conventional local zoning. . . . Current legislation for environmental and ecological protection constitutes but 'a sensitizing of and refinement of nuisance law.'" *CEEED v. California Coastal Zone Conservation Commission supra,* 43 Cal. App.3d at 313 n. 4 and 319.

This Court in *Penn Central* held that "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land use regulations that destroyed or adversely affected recognized real property interests" and that "a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U. S. at 124. The resource protection concerns embodied in California's open space planning and regulatory statutes are clearly grounded in the government's authority to prohibit or prevent activities which may cause a public harm, and they therefore constitute such a public program.

It is highly misleading, however, to assert that regulation under these provisions of the Planning and Zoning Law results in "an authorized *acquisition* of a public resource of a park-like nature . . . " App. Brief 27. The statutory provisions focus entirely on preventing urban sprawl, and on protection of natural resources, rather than open space *qua* open space for aesthetic purposes. Neither



do they authorize physical public use of the property. As noted, Government Code section 65561 deals with "assurance of the continued availability of land for the production of food and fiber" (sub. (a)), discouragement of "noncontiguous development patterns which unnecessarily increases the costs of community services to community residents" (sub. (b)), preservation of valuable open-space land because of the demands of "the anticipated increase in the population of the state" (sub. (c)), and assurance that "the interests of all [California's] people [will be] met in the orderly growth and development of the state and the preservation and conservation of its resources . . . ." The City's ordinance reflects these same policies; it emphasizes protection of natural resources and protection against the adverse impact of unsuitable and improper development. J. S. A. 30-35.

Moreover, the requirement of consistency between a city's open space element of its general plan and its zoning does not by any means preclude all practical, beneficial or economic uses of the land so regulated. If, for example, a City designates agriculturally usable lands as open space in the open space plan, and thereafter zones such lands for agricultural uses, there clearly can be both consistency and reasonable economic use. Consistency exists where "the various land uses authorized by the [zoning] ordinances are *compatible* with the objectives, policies, general land uses and programs specified in such a plan." Calif. Government Code § 65860(a)(ii). The City's ordinances here find residential dwellings to be compatible, so long as "maximum effort" has been made to protect the natural resources of the site. J. S. A. 32-33. In *Dale v. City of Mountain View* (1976) 55 Cal.App.3d 101, the Court, for example, noted that uses permitted under the City's open

space designation included, among others, commercial and noncommercial recreation uses and facilities, golf courses, veterinary clinics, kennels, cemeteries and swimming pools. Protection of natural and aesthetic resources under the California Planning and Zoning Law thus emphatically does not require that property be left without any use whatsoever. Indeed, the California Legislature left no room for argument on this point, by its declaration that the provisions of the California Planning and Zoning Law cannot be construed as permitting a local government, through open-space zoning, to take or damage private property for public use without just compensation. Calif. Government Code § 65912. The City's ordinance likewise states that one of its goals is "to permit the reasonable use of open space land, while at the same time preserving and protecting its open space characteristics . . . ." J. S. A. 30.

Preservation of natural resources and protection against the effects of inappropriately placed development "for the promotion of the general welfare and for the protection of the public interest" (Calif. Government Code § 65561(e)), are permissible legislative goals. "States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Penn Central Transportation Co. v. New York City, supra,* 438 U. S. 104, 129. "The police power is not confined to elimination of filth, stench, and unhealthly places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 9. "It is within the power of the legislature to determine that the community should be beautiful as well as healthy,



spacious as well as clean, well-balanced as well as carefully patrolled." *Berman v. Parker* (1954) 348 U. S. 26, 33.

The appellants nonetheless point to various provisions of California law which indicates that open space lands *may* be purchased by local cities and counties. App. Brief 10, 26. From these provisions, they would conclude that when a local government protects open space and natural resources by open space zoning, the regulation *must* be accompanied by compensation: they contend that government's *power* to exercise eminent domain for open-space and resource protection purposes *a fortiori* characterizes regulation for those ends as "acquisitions of resources to permit or facilitate uniquely public functions." App. Brief 26.

The conclusion is a *non sequitur*. As the Court explained only this term, "'[T]he legislature . . . is authorized to pass measures for the protection of the people . . . in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted.'" *Andrus v. Allard* (1979) ..... U.S. ..... (40 C.C.H. Sup. Ct. Bull. p. B163, B171). Moreover, as the California courts have concluded:

> "While a conceived objective of preserving a scenic, historical and singularly desirable open-space resource may result in conferring a public *benefit,* such an otherwise valid purpose and attendant result is not the equivalent of a public *use* requiring compensation." *Friedman v. City of Fairfax* (1979) 81 Cal. App. 3d 667, 677.

"To require compensation in all such circumstances would effectively compel the government to regulate by *purchase.*" *Andrus v. Allard, supra,* (40 C. C. H. Sup. Ct. Bull. p. B177).

The appellants' argument here is thus nothing less than an attack on the entire concept of land use regulation. Since it is clear that most, if not all, of the aims of any land use regulatory program may also be achieved by eminent domain, their definition of public use would require compensation for *all* regulation which in some way diminishes property values.[10] But the fact that a regulatory measure is enacted to serve a public interest does not mean that it amounts to a public *use* requiring compensation. Regulation cannot validly be enacted unless it serves a reasonable public purpose, but the convergence of public interest and public purpose in it does not compel the use of compensation to achieve its ends: regulation is not an appropriation of property by government for its own uses. *Penn Central Transportation Co. v. City of New York, supra,* 438 U. S. at 135. "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every change in the general law." *Pennsylvania Coal v. Mahon* (1922) 260 U. S. 393, 413; *Andrus v. Allard, supra,* (40 C.C.H. Sup. Ct. Bull. p. B177-178). *Penn Central, supra,* 438 U.S. at 124. The appellants' contention must accordingly be rejected.

The Court must therefore conclude that the failure of the City to include a measure of compensation within its

10. Consider the examples utilized by the Court in *Penn Central Transportation Co. v. City of New York, supra,* 438 U.S. at 130. The height restriction upheld in *Welch v. Swasey* (1909) 214 U. S. 91, could also have been achieved by purchase of the air rights. The setback restrictions upheld in *Gorieb v. Fox* (1927) 274 U. S. 603, could also have been achieved by purchase of a public easement over those portions of the property. In *Penn Central* itself, the restriction could equally have been achieved by purchase of the air rights. As the Court noted, however. " '[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated . . . [T]he 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." 438 U. S. at 130-131.



zoning ordinances does not invalidate the measure. As the Court has concluded, however, the further question must be answered "whether the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].' " *Penn Central Transportation Co. v. City of New York, supra,* 438 U. S. at 136. To that question, we turn.

### III. The Zoning Ordinances of the City of Tiburon On Their Face Do Not Amount to a Taking of Property.

The complaint in this case does not indicate "what the prior zoning was; nor does it allege that the property was down-zoned; nor does it allege, or set forth facts which indicate how, or in what manner, the modified zoning restrictions are more restrictive than those that previously existed . . ." Motion to Dismiss or Affirm, 2 n. 2.[11] It is thus impossible to determine on this record the diminution in value, if any, caused by the City's zoning ordinances. As the Court has noted, in any event, "the decisions sustaining other land-use regulations, which . . . are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking,' [citations omitted] and that the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." *Penn Central Transportation Co. v. City of New York, supra,* 438 U.S. at 131.

As the California Supreme Court explained, the City's ordinances permit one residence on the appellants' property as a matter of right; up to five residences may be permitted, upon application to the City. The ordinances

11. The appellants were afforded an opportunity to amend their complaint, but declined. J. A. 26.

indicate that one of their goals is "to protect and preserve open space land as a limited and valuable resource . . . *and to permit the reasonable use of open space land, while at the same time preserving and protecting its inherent open space characteristics* . . . " J. S. A. 30 (emphasis added). On their face, the ordinances thus do not prohibit all reasonable use of the property, and the California Supreme Court properly rejected the Appellants' assertions to the contrary. J. S. A. 13.

The appellants nonetheless contend that the Constitution requires that they "be afforded a fair chance to prove a taking of [their] property before a trier of fact. App. Brief 15. As we have previously explained, however, such a holding by the Court would effectively transfer administration of the ordinance from the City to the courts: the appellants have never sought a permit under the ordinances from the City, and it is thus impossible to determine the effect of the ordinances *as applied*. On the other hand, the ordinances on their face without question permit reasonable use of the property. There is no need for a factual trial as to that meaning: the California Supreme Court has provided it.

Under these circumstances, the California Supreme Court quite properly ignored the allegation of the complaint that the ordinance "completely destroyed the value of Plaintiffs' property for any purpose or use whatsoever . . . ." J. A. 7. As the California courts have long recognized:

> "The allegation of a sound conclusion of law is always regarded as superfluous in pleading, and the allegation of an unsound conclusion is entirely disregarded. . . . Why should a general demurrer to a complaint be overruled and the parties required to proceed to the trial of an issue of fact when the court, looking to a law of which it is bound to take notice, can clearly see that



> one of the essential allegations of the complaint can never by any legal possibility be proved? What useful or desirable end could be attained by shutting its eyes to the certain event of the litigation and putting the parties to the trouble, delay, and expense of framing and preparing to try issues which can have no influence upon the final result? These questions answer themselves and make it entirely clear that there are no considerations of expediency or convenience to support the contention of appellant."
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> *City of Oakland v. Oakland Water Front Co.* (1897) 118 Cal. 234, 245.

There are five additional factors which support the conclusion that there is no "taking" here. First, the appellants have not been singled out for regulation which is not imposed on other similarly situated parcels. The City's zoning ordinances involved "widespread zoning modifications" throughout the City. J. S. A. 3. As we have noted, the ordinances were adopted pursuant to the mandatory statewide requirements of the California Planning and Zoning Law. There is thus no room for the claim that the appellants have been singled out for arbitrary or singular treatment by the City, or that they are being required to carry more than their fair share of public burdens.[12] Cf. *Penn Central Transportation Co. v. City of New York, supra,* 438 U.S. at 131-135. Unless the Court is willing to reject the determination of not only the City of Tiburon but the California Legislature that such ordinances "promot[e] the general welfare" and "protect[] the public interest," the ordinances must be upheld.

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12. The claim of some of the appellants' amici that this case involves "situations of random and isolated confiscation of property interests" and that the burdens imposed on the appellants are purely "randomized" is thus misplaced. Amici Brief (Goldstein *et al.*) 5, 36.

Second, the California Supreme Court has firmly upheld the Legislature's recognition that "it is in the best interests of the state to maintain and preserve open space lands to assure the enjoyment of natural resources and scenic beauty for the economic and social well-being of the state and its citizens." *Associated Home Builders v. City of Walnut Creek, supra,* 4 Cal.3d 633, 638, 648, (". . . the appallingly rapid disappearance of open areas in and around our cities."); *Sweetwater Valley Civic Association v. City of National City* (1976) 18 Cal.3d 270. Thus, "a state tribunal [has] reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted" by the statutory scheme. See *Penn Central, supra,* 125.

Third, the interference with reasonable "distinct investment-backed expectations" (*Penn Central Transportation Co. v. City of New York, supra,* 438 U.S. at 124) is not sufficient to justify a conclusion of a "taking." Indeed, it is impossible to know the extent of such interference, if any, since the complaint does not allege the degree to which the City's current zoning is more restrictive than that which existed when the appellants' purchased their property. It is also impossible to know, since the appellants have never sought permission to build more than the one residence permitted as a matter of right by the City's ordinances.

Moreover, California law has long been clear and unmistakable that " 'landowners have no vested right in existing or anticipated zoning ordinances.' " *HFH Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 516, cert. den. 425 U. S. 904; *Morse v. County of San Luis Obispo* (1967) 247 Cal.App.2d 600, 602-603. The investments of owners of undeveloped property, such as the appellants, thus "were of a sort which society had adequately made known should not become the object of expectations of continuing enjoyment." Michael-



man, "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 Harv. L. Rev. 1165, 1241. This case therefore differs markedly from *Kaiser Aetna v. United States* (1980) ..... U. S. ..... where the government attempted to convert by regulation an existing private marina "into a public aquatic park . . ."

Fourth, it is important to emphasize again that the open space provisions of the State Planning and Zoning Law do not stand in isolation: each city and county is required to satisfy the other mandatory requirements therein. The mandatory housing element (Government Code § 65302), for example, imposes a requirement upon each local government in California to "make adequate provision for the housing needs of all economic segments of the community."[13] The City of Tiburon is thus compelled, as a matter of state law, to provide through its general plan and zoning ordinances such adequate housing opportunities. *Winkelman v. City of Tiburon* (1973) 32 Cal.App.3d 834. The California Supreme Court has also emphasized that if the impact of local zoning measures "may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region." *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 607. California law thus provides for appropriate and balanced development throughout the state, reflecting numerous social needs and values. Accordingly, it cannot properly be said that the

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13. The California Costal Act (Calif. Public Resources Code §§ 30000 et seq.), which provides a mechanism for the permanent protection of California's coastal resources, also specifies that "housing opportunities for persons of low and moderate income shall be protected, encouraged, and, where feasible, provided." Calif. Public Resources Code § 30213.

purpose of either the City's zoning ordinance or the Planning and Zoning Law is exclusionary. Juris. St. 17-18.

Finally, the land use decisions of the California courts reflect an appropriate constitutional analysis: they have consistently emphasized the "reciprocal benefits and burdens" which must underlie valid zoning actions. *HFH Ltd. v. Superior Court, supra,* 15 Cal. 3d 508, 520-521. "A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare." *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 517. The various mandatory provisions of the California Planning and Zoning Law provide such reciprocity, since they burden, in some way, each and every property owner within the State of California. There can be no conclusion that this statewide regulatory and planning measure does not apply over a broad cross section of land and thereby "secure[] an average reciprocity of advantage." *Penn Central Transportation Co. v. City of New York, supra,* 438 U. S. 104, 147 (Rehnquist, J., dissenting).

The Court must therefore conclude that the City's ordinances do not on their face constitute a taking of property. The ordinances permit reasonable use of the property; they were enacted as part of a comprehensive state-wide mandate designed to properly plan for the future of California. For these reasons, we do not believe that the Court need reach the question of the proper remedy for police power enactments which result in a "taking" of property. Because the Court may decide that question, however, we address it below.



## IV. If a Regulatory Measure Constitutes a Taking of Property Because of Its Effect on a Particular Property Owner, the Appropriate Remedy Is Invalidation of the Measure, Rather Than Judicially Forced Purchase of the Property.

These amici will explain below that if a regulatory measure constitutes a taking of property because of its effect on a particular property owner, the appropriate remedy is invalidation of the measure, rather than judicially forced purchase of the property. The invalidation of the regulatory measure thus leaves the appropriate legislative body with the decision whether the circumstances warrant the exercise of the condemnation power and expenditure of fiscal resources. A contrary result would paralyze regulatory agencies throughout the country.

### A. THE COURT'S PRIOR DECISIONS DO NOT SUPPORT THE ASSERTION THAT A MONETARY REMEDY IS COMPELLED FOR A REGULATORY ACTION WHICH CONSTITUTES A TAKING

The theory that a land use regulatory measure might result in a constitutionally compelled award of damages is of recent origin:

> "During the first part of this century, courts had called harsh regulations takings, and, since no compensation had been offered, the courts invalidated them. It hardly occurred to anyone that if the regulation was a taking, then a possible remedy was for the property owner to sue in inverse condemnation . . .
>
> "Until the 1970s, no reported case recognizing inverse condemnation for mere regulation could have been cited." Hagman and Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation* (1978) 256, 272.

Indeed, Hagman and Misczynski assert that the concept of compensable regulation was never even raised until 1953. *Id.* at 256.

In fact, several notable property law experts, in a comprehensive historical analysis of the taking clause, concluded that the clause was never intended to apply to regulation of land at all, and that it derived only "from the English nobles' fear of the King's seizures of land for his own use . . . But the use of land was being regulated—often very severely regulated—throughout English and early American history. Only around the turn of the Twentieth Century did judges and legal scholars popularize the notion that if regulation of the use of land became excessive, it could amount to the equivalent of a taking." Bosselman, Callies and Banta, *The Taking Issue* (1973) 319.[14]

Thus, the appellant's claim that "this Court's precedents uniformly support the appropriateness of the monetary 'just compensation' remedy in taking cases" is fiction. They assert that in *Penn Central Transportation Co. v. City of New York, supra,* 438 U. S. 104 and *Lake Country Estates v. Tahoe Regional Planning Agency* (1979) 440 U. S. 391 "the availability of just compensation remedy was not even questioned." App. Brief 34. *Penn Central,* however, hardly assists the appellants: the Court there noted that the appropriate question before it was "whether a particular restriction *will be rendered invalid* by the government's failure to pay for any losses proximately caused by it . . ." 438 U. S. at 124 (emphasis added). *Penn Central* also declares that the appropriate question in a "taking" case is "whether the interference with appellants' property is of such a magnitude

14. "The exact motivation for the adoption of the taking clause may never be ascertained, but at least one thing is clear: the draftsmen were not troubled by any issue involving regulation of the use of land. Such regulations had been standard practice in England and throughout colonial times and seem to have provoked no serious controversy. There is no evidence that the founding fathers ever conceived that the taking clause could establish any sort of restrictions on the power to regulate the use of land." *Id* at 104.



that 'there must be an exercise of eminent domain and compensation to sustain [it]." 438 U. S. at 136. If anything, *Penn Central* thus supports the conclusion that invalidation is the appropriate remedy for a regulatory "taking", unless the regulating government voluntarily chooses to maintain the validity of the regulation by resort to power of eminent domain. *Lake Country,* on the other hand, simply indicates that "there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests" without discussing the form of relief required. 440 U. S. at 405, n. 29. On remand from *Lake Country,* a federal district court has in fact concluded that invalidation, rather than damages, is the appropriate remedy. *Jacobson v. Tahoe Regional Planning Agency* (D. Nev. 1979) 474 F.Supp. 901.

The additional claim that *Hurley v. Kincaid* (1932) 285 U. S. 95 "is well nigh dispositive" (App. Brief 35) is even further afield. *Hurley* not only involved physical invasion of land—there a flooding easement—but also involved an affirmative governmental decision to proceed with a public works project which would physically affect private property, without first filing condemnation proceedings. *Hurley,* and the other similar cases cited by the appellants (App. Brief 35, n. 16) simply reflect a corollary to the rule that the United States may constitutionally enter into physical possession of property without first filing condemnation proceedings, and instead may take the property and require the owner to himself institute proceedings under the Tucker Act. *United States v. Dow* (1958) 357 U. S. 17, 21. Where such a conscious governmental choice is made, an injunction against the project would thwart the Government's admittedly constitutional power of condemnation; under such circumstances, limiting the remedy to an award of damages is of course proper, and is the only remedy consistent with the affirmative governmental decision to condemn.

In *Regional Rail Reorganization Act Cases* (1975) 419 U. S. 102, the Court utilized the same analysis. There, the Court concluded that Congress intended for its reorganization measure to become effective, and also intended to provide a Tucker Act remedy, in the event that its action violated the Fifth Amendment. An injunction in that case, rather than the damage remedy, would have dismantled the comprehensive reorganization scheme assembled by Congress. An award of damages thus simply effectuated Congressional purpose, consistent with Congressional awareness that its actions might require compensation to remain valid. As the Court noted:

> "There are clearly grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available as compensation for any unconstitutional erosion not compensated under the Act itself .... [O]ur 'task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations.'" 419 U. S. at 134.

Thus, these cases have sanctioned the use of a damage remedy only where Congress first determined that resort to the public purse was appropriate: that decision was not made by the Court as a constitutional command.

**B. A MONETARY REMEDY FOR A REGULATORY ACTION WHICH CONSTITUTES A TAKING IS INAPPROPRIATE UNLESS THE REGULATING AGENCY HAS AFFIRMATIVELY DETERMINED TO EXERCISE ITS POWER OF EMINENT DOMAIN. A CONTRARY CONCLUSION WOULD TRANSFER THE POWER OF EMINENT DOMAIN FROM LEGISLATURES TO THE JUDICIARY**

The position of the amici was succinctly stated by the New York Court of Appeals in *Fred F. French Investing Co. v. City of New York* (1976) 385 N.Y.S. 2d 5, appeal dism'd. 429 U.S. 990:



> "The power of the State over private property extends from the regulation of its use under the police power to the actual taking of an easement or all or part of the fee under the eminent domain power. . . .
>
> "[W]hen the State 'takes', that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid. Of course, and this is often the beginning of confusion, a purported 'regulation' may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a 'taking', and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid.
>
> "True, many cases have equated an invalid exercise of the regulating zoning power, perhaps only metaphorically, with a 'taking' or a 'confiscation' of property, terminology appropriate to the eminent domain power and the concomitant right to compensation where it is exercised. . . .
>
> "The metaphor should not be confused with the reality. Close examination of the cases reveals that in none of them, anymore than in the *Pennsylvania Coal* case . . . was there an actual 'taking' under the eminent domain power, despite the use of the terms 'taking' or 'confiscatory'. Instead, in each the gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause, and the cases were decided under that rubric .... As has been cogently pointed out by Professor Costonis: 'the goal of [challenges to regulatory measures] in conventional land use disputes is to preclude application of

> the measure to the restricted parcel on the basis of constitutional infirmity. What is achieved, in short, is declaratory relief. The sole exception to this mild outcome occurs where the challenged measure is either intended to eventuate in actual public ownership of the land or has already caused government to encroach on the land with trespassory consequences that are largely irreversible.' " 385 N.Y.S.2d at 8-9.

Thus, as the New York Court noted, the power to regulate and the power of eminent domain are two discrete powers of government: the fact that the former may be limited by the same constitutional clause which limits the latter does not mean that the latter has *a fortiori* been exercised when that limit is reached. Where the legislature has not chosen to exercise its eminent domain power, the Courts should not compel its use as a damage remedy. Such a result simply recognizes the proper institutional role of the legislative branch of government in determining when that legislative power should be exercised.[15]

That institutional understanding underlies many recent federal decisions in this area of the law. In the *Regional Rail Reorganization Act Cases, supra,* 419 U. S. 102, for example, the District Court had declared section 304(f) of the Reorganization Act void, as constituting a taking

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15. Prior to *Agins,* the California Supreme Court had expressed the same view. In *HFH Ltd. v. Superior Court, supra,* 15 Cal.3d 508, cert. den. 425 U. S. 904, the Court stated:

> "Courts have thus recognized that '[o]f course, it is not a tort for Government to govern . . . . *(Dalehite v. United States* (1952) 346 U. S. 15, 57, (Jackson, J., dissenting); *Muskopf v. Corning Hospital Dist.* (1961) 55 C.2d 211, 220.) Justice Jackson's mot expresses both a principle of law and a necessity of rational government; both constitutional and institutional understandings require that legislative acts, even if improper, find their judicial remedy in the undoing of the wrongful legislation, not in money damages awarded against the state." 15 Cal.3d at 519.



of property. The District Court refused to award damages for that taking, on the ground that damages would be " 'judicial legislation on a grand, if not arrogant scale.' " 419 U. S. at 126. This Court concluded that Congress intended to provide for a damage remedy in the event that the Act constituted a taking, and therefore reversed the judgment. The Court emphasized, however, that such remedies could not be provided by the Court, and that the appropriate question was whether *Congress* had intended to provide them. As the Court declared:

> " 'The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government . . . .' " 419 U. S. at 127 n. 16.

In *Pauley Petroleum Inc. v. United States* (Ct. Cl. 1979) 591 F.2d 1308, 1326-1327, cert. den. ..... U.S. ....., the Court likewise rejected a claim that an action by the Secretary of the Interior suspending oil drilling leases constituted a "taking" of the leasehold interests which had originally been granted by the United States:

> "Plaintiffs fail to meet at least one of the prerequisites for a constitutional taking—the requirement that the taking be authorized by Congress. In order to establish a constitutional taking, plaintiffs must show that the officer committing the alleged taking has either express or implied legislative authority to take the property . . . .
>
> " 'But Congress no more impliedly authorized the Secretary to take the leasehold by prohibiting its beneficial use than by a condemnation proceeding. A suspension for which the fifth amendment would require compensation is therefore unauthorized and beyond the Secretary's power . . . .' It follows . . . that there

was no constitutional exercise of the eminent domain power."[16]

*Accord: Union Oil Co. v. Morton* (9th Cir. 1975) 512 F.2d 743; *Gregory v. City of New York* (S.D.N.Y. 1972) 346 F.Supp. 140, 143; *Golding v. New Britain* (Pa. 1978) 382 A.2d 509. In *NBH Land Co. v. United States, supra,* the Court likewise declared:

> "Cases of 'inverse' takings without physical invasion or ousters are not very numerous, and when they occur . . . this court has been careful to consider the role of Congress, and the taking, if not expressly authorized or directed by Congress, at least is a natural consequence of Congressionally approved measures . . . . To reach the result of those cases here, in a case when the only participation by Congress has been to reject the acquisition out of hand, would strike a blow at the power of the purse. The exclusive assignment of that power to Congress is the foundation of our liberties." 576 F.2d at 319.

The federal courts have thus rejected the appellants' contention that the question whether a public agency has affirmatively chosen to exercise its eminent domain power

16. *Drake's Bay Land Co. v. United States* (Ct. Cl. 1972) 424 F.2d 574, often cited by the appellants, is consistent with this view. In *NBH Land Co. v. United States* (Ct. Cl. 1978) 576 F.2d 317, the Court explained:

> "It was an express assumption in *Drake's Bay* that Congress hoped its measure would not transgress the line drawn by the fifth amendment, but was presumably aware, if they did, they would generate money claims under the Tucker Act . . . . [A] Tucker Act suit does not lie for an executive taking not authorized by Congress, expressly or by implication." 576 F.2d at 319.

*Drake's Bay* involved legislation under which Congress announced the acquisition of "an inchoate interest at once, to be perfected later." 424 F.2d at 584. An inverse judgment was thus fully consistent with Congressional intent to formally acquire the property.



is irrelevant in determining the remedy for a regulatory "taking" of property. App. Brief 15-21. Instead, the courts have emphasized that the legislative branch is the appropriate branch of government for a determination whether that power will be exercised, and public funds expended.[17] The appellants themselves concede the correctness of this view: as they note, "the exercise of the taking power" "is a political question" and its exercise "has been entrusted to the legislature . . . ." App. Brief, 16-17. In this case, of course, the City of Tiburon once sought to purchase the appellants' property, but abandoned the attempt because of the expected high cost of the property; the City Council has thus affirmatively declined to further exercise its power of eminent domain. As we previously noted, moreover, the California Legislature has declared that the provisions of the Planning and Zoning Law cannot be construed as permitting a local government, through open space zoning, to take private property for public use without just compensation. Calif. Government Code § 65912.

17. California law provides detailed limitations and procedures for exercise of the eminent domain power. "The power of eminent domain may be exercised to acquire property for a particular use only by a person authorized by statute . . ." and "[a] public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of [California law]." Calif. Code of Civil Procedure §§ 1240.202 and 1245.220. Such a resolution of necessity requires specific factual determinations by the governing body of the public entity. Calif. Code of Civil Procedure § 1245.230. See generally Calif. Code of Civil Procedure §§ 1230.010 et seq. Under California law, a municipality does not have the power of eminent domain unless authorized by statute and it must adhere to the procedures established by statute. *City of Beaumont v. Beaumont Irrigation District* (1965) 63 Cal.2d 291; *City and County of San Francisco v. Ross* (1955) 44 Cal.2d 52. State agencies likewise do not have the power of eminent domain, unless specifically authorized by statute. *People v. Superior Court* (1937) 10 Cal.2d 288. None of these California amici has been given that power.

The California Supreme Court decision in this case reflects the proper judicial respect for those determinations. As the Court declared:

> "Plaintiffs contend that the limitations on the use of their land imposed by the ordinance constitute an unconstitutional 'taking of [plaintiffs'] property without payment of just compensation' for which an action in inverse condemnation will lie. Inherent in the contention is the argument that a local entity's exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation. We are unable to accept this argument believing the preferable view to be that, while such a governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available. . . ." J. S. A. 5

A contrary result would significantly reduce, if not emasculate, legislative control over the proper allocation of often limited financial resources. For example, we are advised by the City that the $2,000,000 damage claim for the appellants' five-acre parcel is alone far more than the City's annual budget: the appellants' complaint was filed in 1975, and the City's *total* budget for that year was only $824,000. A judgment in the amount sought would thus destroy the City's ability to provide other necessary public services. Cf. *National League of Cities v. Usery* (1976) 426 U. S. 833, 852.

Two other examples demonstrate the same point. In *Virginia Surface Mining and Reclamation Association v. Andrus* (W. D. Va. 1980) ..... F. Supp. ....., a District Court held that certain provisions of the federal Surface Mining Control and Reclamation Act so burdened the owners of potential coal producing land as to constitute a taking of property in violation of the Fifth Amendment. That federal



Act applies to a large percentage of the land in the Commonwealth of Virginia, not to mention other states. If the appellants' contentions here are accepted, and if the District Court's conclusion in *Virginia Surface Mining* is correct, the conclusion must logically be reached that the United States has inadvertently purchased an enormous portion of the Commonwealth of Virginia.

In *Sotomura v. County of Hawaii* (D. Haw. 1978) 460 F.Supp. 473, a District Court held that a decision of the Hawaii Supreme Court in effect "took" the plaintiffs beachfront property. Since the Hawaii Supreme Court decision purported to establish a property rule throughout the State of Hawaii, under the appellants' theory here Hawaii is now likewise inadvertently obligated to pay the fair market value of all such property. The appellants draw no distinction between agencies which have the power to condemn, and those which do not.

The California Court's decision, on the other hand, leaves the question of the exercise of the eminent domain power to the Legislature, where it institutionally should rest. " 'If a zoning ordinance is enjoined, the legislative body, rather than the court, can then decide whether the social benefits flowing from the plan warrant the exercise of eminent domain and the expenditure of public resources. When the legislature decides that the costs outweigh the benefits, it can either abandon the objective entirely, enact less stringent regulation or combine regulation with compensation.' " *Jacobson v. Tahoe Regional Planning Agency, supra,* 474 F.Supp. 901, 904.[18]

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18. Some States have explicitly provided for such a determination in the regulatory measure itself. The Delaware Wetlands Statute (7 Delaware Code, Chapter 66), for example, provides that "if the Superior Court finds that the action appealed from constitutes a taking without just compensation, it shall invalidate the

In summary, as the California decision explained, "'[i]n enacting a zoning ordinance, the legislative body assesses the desirability of a program on the assumption that compensation will not be required to achieve the objectives of that ordinance.'" J.S.A. 11. If that assumption is incorrect, however, and if "the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it]'" (*Penn Central, supra,* 136), the weighing of costs and benefits in the decision whether that power should be exercised should be left to the legislature rather than the courts.

### C. MONETARY DAMAGES FOR A LAND USE REGULATION WHICH CONSTITUTES A TAKING WOULD PARALYZE LAND USE REGULATION

The extraordinary breadth of the appellants' contention must be recognized. This Court has consistently held that the diminution in value caused by a regulatory measure does not result in a taking of property, and compensation is not required to sustain its validity. *Penn Central Transportation Co. v. City of New York, supra,* 438 U. S. at 131. The appellants, however, argue that a regulatory measure which renders property valueless *is* a taking, and that compensation for the full fee value of the property must thereupon be paid. Thus, even though the plaintiff in *Euclid Realty* must bear a 75% loss in property value without any compensation, and even though the plaintiff in *Hadacheck* must bear an 87½% diminution without any compensation (*Penn Central* at 131), the appellants here argue that they

order and grant appropriate relief . . . ." The effect of such an order is, however, statutorily stayed for a period during which the Secretary of Natural Resources and Environmental Control may determine whether to invalidate his action or to initiate condemnation proceedings to acquire the fee or any lesser interest. A similar provision is provided in the Delaware Coastal Zone Act (7 Delaware Code, Chapter 70). Other states have similar provisions. E.g., Mass. Gen. Laws C. 131, § 40A, and C. 130, § 105.



are entitled to *complete* compensation for the full fee value of their property. In addition, the appellants do not suggest any form of immunity which would be applicable to this case. They contend that "when a taking occurs, the question is whether just compensation has been paid . . . [T]he subjective 'intention' of the taking entity is of no moment . . ." App. Brief 17-18.[19] Slightly cross the line, so say the appellants, and the hammer falls.

Under these circumstances, it is no hyperbole to state that the Court's acceptance of the appellants' contentions would paralyze local land use regulatory bodies. Especially given the limited budgets of most cities, only the bravest legislator or regulator will venture more than the mildest, and most ineffectual, form of land use controls.

The California Supreme Court's decision properly emphasizes this effect as a ground for rejecting damages as a possible remedy:

> "The expanding developments of our cities and suburban areas coupled with a growing awareness of the necessity to preserve our natural resources, including the land around us, has resulted in changing attitudes toward the regulation of land use. Recognition of this historic trend is not new. The United States Supreme Court perceptively observed more than 50 years ago that with the passage of time and increased concentration of people 'problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use

19. The appellants, with scant regard for consistency, nonetheless attack the well-settled rule that the motives of legislators and administrative decision makers may not be probed. App. Brief 52 and n. 31. E. g., *United States v. Morgan* (1941) 313 U. S. 409, 422; *Fletcher v. Peck* (1810) 6 Cranch 87, 130-131; *United States v. O'Brien* (1968) 391 U. S. 367, 383; *State of California v. Superior Court* (1974) 12 Cal.3d 237; Bickel, *The Least Dangerous Branch* (1962) 215.

and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, . . . And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.' (*Euclid v. Ambler Realty Co.* (1926) 272 U. S. 365, 386-387.)

"In the half century since *Euclid* the foregoing abstract principles under the force of experience have coalesced into a specific functional requirement. Community planners must be permitted the flexibility which their work requires. As we ourselves have recently observed, 'If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land.' (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 120.)

"Other commentators have recognized that the utilization of an inverse condemnation remedy would have a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary. 'This threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less



stringent, more traditional, and fiscally safe.' (Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?* (1977) 28 Hastings L. J., 1569, 1597)." J. S. A. 9-11.

The New York Court of Appeals has expressed the same view:

> "[T]he prospect of tort liability might impede . . . desirable governmental regulation and legislation since [governmental] officers might fear subsequent judicial imposition of massive tort recoveries. Open-ended liability could inhibit the enactment of needed, but constitutionally borderline, legislation. The most salutary and effective means to curtail unconstitutional action is to stop the action before it can take effect. Indeed, the prospect of a tort action might incite potential plaintiffs to cumulate their damage and institute their constitutional claims only after significant passage of time and significant reliance upon the heretofore unchallenged validity of its action by the governmental unit involved. In the absence of legislative guidance and compelling precedent, we decline to extend tort liability for unconstitutional action to situations where government has not trespassed in some manner upon the burdened property." *Charles v. Diamond* (1977) 392 N.Y.S.2d 594, 604-605.

The paralyzing effect of such a result would also be felt by these amici, since each administers not local land use ordinances, but regional or statewide regulatory measures designed to control or prevent land uses harmful to the environment or to the natural resources of the state. Other states have enacted similar statutes designed specifically to prevent damage to wetlands. These measures often involve innovative statutory procedures and standards to achieve their stated ends, and those procedures and standards normally have not been tested by the courts for their constitu-

tional validity, prior to the enactment of the measure. E.g., *CEEED v. California Coastal Zone Conservation Commission, supra,* 43 Cal.App.3d 306; *Candlestick Properties v. San Francisco Bay Conservation and Development Commission, supra,* 11 Cal.App.3d 557. The *CEEED* case, for example, began as a class action seeking damages for each property owner on California's 1100-mile coastline, on the ground that each such property had been "taken" by the passage of the California Coastal Zone Conservation Act of 1972. To conclude that even inadvertent constitutional violations flowing from such regulation require monetary compensation would necessarily end such innovative and necessary regulation by the states.

This Court has consistently emphasized, however, that a damage remedy should not be available where it would have such an effect:

> "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subject to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney v. Brandhove* (1951) 341 U. S. 367, 377.

*Accord: Lake Country Estates v. Tahoe Regional Planning Agency, supra,* 440 U. S. 391.

*Tenney* and *Lake Country,* of course, dealt with damage actions against the individual legislators of a state legislature and a regional body. There is no reason, however, not to apply the same rationale to local legislators and the local legislative body which they represent and which they



collectively form. Indeed, municipal legislators and local legislative bodies are closer to their constitutents than either their state or federal counterparts; the impact of their regulatory actions is more easily apparent. They thus are the most vulnerable to and least able to defend lawsuits caused by the passage of legislation. The gross variance between the damages sought by the appellants here and the City of Tiburon's operating budget alone demonstrates the inhibiting effect which the prospect of damages against such public officials and agencies can have. If that effect is multiplied by potential damage claims for the remainder of the land within the City, land use regulation, not to mention innovative regulatory measures, cannot conceivably withstand the financial threat.

These amici also believe it important to emphasize the costs of litigating an action in which damages is a possible remedy, as opposed to an action in which invalidation is the result. In either case, the first item of proof for the property owner is evidence that the property has been "taken." Whether the action is for damages or invalidation, this proof would remain the same. In an action for damages, however, rather than a judicial decree of invalidation after such a showing, the parties must proceed to try the issue of the fair market value of the property, with all the attendant complexities and technicalities of an eminent domain proceeding. In states such as California, the cost of the litigation, if the landowner is successful, is taxable to the regulatory body. Calif. Code of Civil Procedure § 1036. This amount includes his "reasonable attorney, appraisal, and engineering fees, actually incurred . . ." *Id.* The property owner is also entitled to interest from the date of taking. As a result, the cost to the public agency from a successful inverse condemnation damage action is far more

than simply the fair market value. Moreover, even if the public agency is successful in prevailing in the appellate courts, it cannot recover its complete defense costs.

One recent case is instructive on this point. In *Briggs v. State of California* (1979) 98 Cal.App.3d 190, the California Court of Appeal reversed an inverse condemnation judgment against the State of California. The record in that case, which we expect to be before this Court on petition for certiorari in the near future, discloses that the State's defense expenditures were more than $235,000; the trial court also concluded that the landowner's costs were more than $200,000, and her reasonable attorneys' fees were $751,000.[20] The simple *potential* for incurring all or part of such costs, even in a successful action, is thus an additional inhibiting factor to any regulatory agency.

The costs and judgments in damage actions arising from land use regulatory measures will, if the appellants' contentions are accepted, paralyze land use regulation throughout the United States.[21] For that reason alone, the California Supreme Court's decision must be affirmed.

20. We cannot help but comment on the appellants' distorted recitation of the facts in *Briggs*. The recitation cannot be attributed to a lack of familiarity with the record, since the appellants' lead counsel here (as well as two of their amici) have represented Briggs. The trial court there found that a permit application by Briggs to the Coastal Commission was denied for the reasons stated by the Coastal Commission, which included not only a possibility of purchase but inconsistency with the substantive standards of the California Coastal Act. Moreover, the permit was not denied permanently, but only for the limited and interim planning and regulatory period of the 1972 Coastal Act. The trial court awarded $469,300 in damages to Briggs based *solely* on the permit denial. The Court of Appeal held that the permit denial was a constitutionally permissible exercise of the Commission's temporary powers. In the alternative, it held that the denial should have been remedied by mandate under *Agins* rather than by an award of damages. It is thus nonsense to suggest that the California Court of Appeal required Briggs to seek invalidation even before her purported cause of action accrued. App. Brief 50.



## V. Invalidation of a Regulatory Measure Which Constitutes a Taking of Property Is an Effective and Appropriate Remedy.

A large portion of the appellants' brief is directed to the *ipse dixit* that the California courts fail to provide the protection required by the federal constitution to private property rights. That assertion is incorrect.

In the opinion below, the Court stated:

> "While acknowledging the power of government to preserve and improve the quality of life for its citizens through the regulation of the use of private land, we cannot countenance the service of this legitimate need through the uncompensated destruction of private property rights. Such Fifth Amendment property rights have been equated by the constitutional draftsmen with the cherished personal protections against self-incrimination, double jeopardy, and the guarantee of due process of law." J. S. A. 7.

Moreover, within one year of the *Agins* decision, the same Court twice concluded that monetary damages could be an appropriate remedy for unconstitutional governmental interference with property rights. *Furey v. City of Sacramento* (1979) 24 Cal.3d 862, 873, app. dism'd. ..... U. S. ..... (rezoning precluding realization of substantially all special

21. One additional factor bears on this point. A judicial determination that a regulatory action has deprived property of all value can be made only after a trial on the merits; such a trial invariably involves completely disparate valuation testimony from appraisers for the parties, with the trial court deciding the case simply by a preponderance of the evidence. In short, the case will inevitably be decided by the perception of the trial judge, and his individualized analysis of the conflicting evidence. It would be impossible for a regulatory agency to draw a hard and well-defined line as to the permissible extent of its powers, in light of that variable reality.

benefits generated by assessment district); *Jones v. People ex rel. Department of Transportation* (1978) 22 Cal.3d 144 (access denied to private property by regulatory action, in conjunction with construction of public project); see also *Klopping v. City of Whittier* (1972) 8 Cal.3d 39. The appellants' contention that the California courts will ignore the protections afforded by the federal constitution to private property owners is thus completely unwarranted.[22]

The appellants' further suggestion that public agencies will simply change an invalidated regulatory measure in an effort to frustrate both the judicial decree of invalidation and the landowner's private property rights is likewise without merit. "[T]his problem" (App. Brief 47) is—like many of appellants assertions—without citation of case authority. Public officials, after all, are also sworn to uphold constitutional rights to the best of their ability, and they therefore are not likely to knowingly and voluntarily violate that oath. The lack of any citations by appellants to support their claim is the best evidence of the non-existence of "this problem." Amicus California Coastal Commission, for example, has been told by the California courts that its regulatory decisions in some cases were improper. With only one exception, the matters were expeditiously resolved in further administrative proceedings; in the one exception, the Commissions reached the same result as they

22. The appellants' recitation of cases (App. Brief 45-47) purportedly demonstrating their point is incomplete; they fail to note that in many of them, this Court later dismissed an appeal or denied certiorari. E.g., *McCarthy v. Manhattan Beach* (1953) 41 Cal.2d 879, cert. den. 348 U. S. 817; *Consolidated Rock Products Co. v. City of Los Angeles* (1962) 57 Cal.2d 515, appeal dismissed for lack of a substantial federal question 371 U. S. 36; *Avco Community Developers v. South Coast Regional Commission* (1976) 17 Cal.3d 785, appeal dismissed for lack of jurisdiction and cert. den. 429 U. S. 1083; *Frisco Land and Mining Co. v. State of California* (1977) 74 Cal.App.3d 736, cert. den. 436 U. S. 918.



had in the first instance, and their decision was ultimately sustained on return to the courts.[23] Thus, this Court should not uphold the massive financial dislocation and regulatory paralysis which the appellants seek here, simply to protect against the improper governmental actions which they unjustifiably speculate and hypothesize may occur.

Public officials, in addition, do not lightly risk contempt of court sanctions for subverting judicial decrees. The courts, both state and federal, have sufficient enforcement powers to ensure that their decrees are observed, including the ultimate power to mandate specific actions, if good faith responses are not forthcoming. There are thus numerous means, other than the drastic remedy sought here, to provide relief for improper governmental responses after a decree invalidating a regulatory measure.

## CONCLUSION

For each of these reasons, these amici therefore respectfully urge that the judgment of the California Supreme Court be affirmed.

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23. The appellants assert—again without citation of authority—that the Coastal Commissions "literally pride themselves on their capricious and callous treatment of property owners . . ." App. Brief 47. If that were so, the state and federal courts would long ago have brought the Commissions up short. A review of the litigation in which the Commissions have been involved, however, virtually all sustaining the Commissions' actions, firmly emphasizes that the contention is only epithetical excess.